Supreme Court, U.S.
FILED

091185 MAR 15 2010

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No. 09-___

IN THE

Supreme Court of the United States

FORREST J. SAFFO and
SALLIE M. SAFFO,
Petitioners,

v.

FOXWORTHY, INC. and
CHARLES L. WILSON, III,
Respondents.

On Petition for a Writ of Certiorari to the Georgia Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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March 15, 2010

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QUESTION PRESENTED

1. Whether a statute that requires two eighty year old homeowners to pay more than $112,000 as a condition precedent to continuing their lawsuit challenging the validity of the taxation, tax execution, levy, and sale of their residence for alleged non-payment of property taxes violates the due process clause of the Fourteenth Amendment.

2. Whether the Georgia Supreme Court's construction of property tax collection statutes providing that the sheriff "shall" provide certain notices to a property owner leading up to or following a tax sale as being merely "directory" instead of "mandatory" violates the due process clause of the Fourteenth Amendment.

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[1] Pursuant to U.S. Supreme Court Rule 29(4)(c), Petitioner hereby notifies the Court that 28 U.S.C. §2403(b) may apply and that the Attorney General for the State of Georgia will continue to be included on the certificate of service (as they have with earlier briefs filed in proceedings below).

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OPINION BELOW

The decision of the Georgia Supreme Court has been published in the official reporters as *Saffo v. Foxworthy, Inc.*, 286 Ga. 284 (2009) (J. Benham and J. Hunstein writing a separate concurrence) and the amended decision and denial of Petitioners' timely motion for reconsideration as published by that Court is included in **Appendix A** at 1a-13a. The orders of the trial court (Fulton County Superior Court) in which, inter alia, summary judgment was granted to Respondents on their quiet title counterclaim following a tax sale are included in **Appendix A** at 14a-18a.

JURISDICTION

The Georgia Supreme Court filed its initial decision on November 23, 2009. Petitioners timely filed a motion for reconsideration which was denied on December 15, 2009. This Court has jurisdiction under 28 U. S. C. § 1257(a) to review the Georgia Supreme Court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Georgia's relevant statutory provisions relating to the assessment and collection of taxes and the duties of the sheriffs in relation thereto are included in **Appendix B**. Applicable constitutional provisions or amendments are included in the body of this petition.

STATEMENT OF FACTS [1]

Reverend and Mrs. Saffo, both close to 80 years old, have been married for over 55 years. Until his recent retirement, Reverend Saffo was the pastor of New Mountaintop Baptist Church in Douglas County, Georgia. Since 1983, the Saffos owned and lived in the property located at 685 Chickadee Court, SW, Atlanta, Fulton County, Georgia (the "Home") where they raised their children and planned to remain for the rest of their lives.

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[1] Because the rulings being reviewed included an order granting the Respondents' motion for summary judgment and dismissing the Saffos' claims, all doubts as to the evidence and the benefit of any conflicts were to be resolved in favor of the Saffos and construed against Respondents/movants and when presented with a choice of inferences to be drawn from the facts, all inferences of fact had to be drawn against the Respondents/movants and in favor of the Saffos. *See, e.g. Barlow v. Orkin Exterminating Co., Inc.*, 196 Ga. App. 822, 823 (1990).

Unbeknownst to Reverend and Mrs. Saffos–they received no prior notice or process of any type–their home was taken from them in a tax sale in February, 2000. They purportedly owed roughly $2,300 in taxes; their home was purchased by Foxworthy, Inc., at the tax sale for $51,000. Foxworthy is one of several companies in Georgia whose business it is to seek to profit by purchasing properties at tax sales for far less than their fair market value. Respondent Wilson is Foxworthy's day-to-day manager.

It was not until roughly a year later, in February 2001, that the Saffos first learned that the Home was no longer listed in their names. Reverend Saffo subsequently spoke with Wilson who claimed that Foxworthy had acquired the Home at a tax sale and they discussed "how [the Saffos] could get it back" by paying some substantial amount of money. The Saffos went to a bank to obtain the money to satisfy Foxworthy's demands, however, they were told that they could not borrow money on property they did not own. Unable to meet Foxworthy's demands, the Saffos did not follow up, but neither did Foxworthy.

In or about February 2004, the Saffos were served by a sheriff with eviction papers whereupon they contacted Wilson who threatened to proceed with eviction unless the Saffos paid Foxworthy close to $100,000.

Faced with Foxworthy's threats and demands for payment, in July 2004, the Saffos filed a suit seeking, among other things: (a) an injunction barring Foxworthy from making further threats or instituting dispossessory proceedings; and (b) recovery of damages for, among other things, the interference with their rights to quiet and peaceful enjoyment of the

Home. In their Complaint, the Saffos did not seek to quiet title to their Home or to set aside, cancel, or in any way invalidate the alleged tax deed. Rather, Foxworthy sought to quiet title in its counterclaim arguing that "[t]he right of redemption pursuant to O.C.G.A. § 48-4-45 et seq. has been barred by virtue of notices given and served to the Plaintiffs."

According to Foxworthy, it paid $51,406.88 to purchase the Saffos' home at a tax sale purportedly conducted on February 1, 2000 for the purposes of collecting $2,270.31 in allegedly delinquent property taxes. Prior to being contacted by Foxworthy in 2004, the Saffos never received notice that: (1) tax bills had been issued; (2) tax bills were due; (3) a fifa would be issued if taxes were not paid by a date certain; (4) a fifa had been issued; (5) unless paid, the fifa would be transferred to a third party (a private for-profit enterprise); (6) any fifas had, indeed, been transferred to a third party; (7) the sheriff had levied on the Home; or (8) their Home would be sold at a tax sale.

Foxworthy produced no evidence that any of foregoing notices had been sent, given, or delivered to the Saffos, nor did it produce any evidence that the Saffos had received any of the foregoing notices. Instead, Foxworthy relied on the sheriff's purported recitations in the tax deed and presumptions arising therefrom.

On September 20, 2004, the Foxworthy parties filed their motion to dismiss claiming they had complied with Georgia law in barring the Plaintiffs' right to redeem the property and arguing that the Saffos could not challenge the alleged tax sale because they had not tendered the redemption price before bringing this action. The Saffos, having been unaware of any tax sale, insisted on strict proof that a proper

sale took place and that all conditions precedent to such a sale had been satisfied. The Saffos also denied that they had received any notices of the barment of their rights of redemption. The Saffos also raised and argued in their briefs filed in the state trial and appellate courts their position that the Georgia statutory scheme, both as enacted and as applied, violated rights guaranteed to them by the United States Constitution and its amendments.

Even if the notice of barment had been properly served as alleged by Respondents (and disputed by the Saffos), Respondents' documents showed that the Saffos were not given the minimum amount of time to redeem the Home as provided in O.C.G.A. § 48-4-46(b). In November 2004, apparently concerned that it had not properly barred the Saffos' right of redemption prior to filing eviction proceedings and demanding close to $100,000, Foxworthy served the Saffos with a notice purporting to bar their right of redemption unless payment of more than $110,000 was paid within thirty days.

In its order which, *inter alia*, granted Respondents' motion for summary judgment, the trial court concluded that: (1) "Plaintiffs did not tender the full redemption amount prior to filing the suit, pursuant to O.C.G.A. § 48-4-47(a);" (2) the Saffos' right to redeem their Home "is now barred;" (3) "to the extent that Plaintiffs argue that the tax sale must be invalidated because the Sheriff did not comply with the statutory notice requirements, Plaintiffs' remedy would be as against the Sheriff, rather than the purchasers. *Harper v. Foxworthy*, 254 Ga. App. 495, 498 (2002);" and (4) the Saffos produced no evidence that the purchaser engaged in "collusion or fraud."

The Georgia Supreme Court affirmed on essentially the same grounds as the trial court, concluding in essence that, because the Saffos had not paid the redemption price of more than $112,000, they could not challenge the validity of the assessment of the tax, the tax lien judgment or writ of execution, the transfer of the tax lien, the levy, or the tax sale, itself. As for the Saffos' challenges to the Georgia statutory scheme based on the United States Constitution, the Georgia appellate court relied on *Jones v. Flowers*, 547 U.S. 220, 223 (2006) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) to conclude that "[d]ue process does not require that a property owner receive actual notice before the government may take his property" . . . all that is required is that "the government provide notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." (Citations and quotations omitted).

In his concurring opinion (in which he was joined by Justice Hunstein), Judge Benham noted as follows:

> [T]he enforcement and collection of taxes through the sale of the taxpayer's property has been regarded as a harsh procedure, and, therefore, the policy has been to favor the rights of the property owner in the interpretation of such laws." (Citation and punctuation omitted.) *Wallace v. President Street, L.P.*, 263 Ga. 239 (1) (430 SE2d 1) (1993). **While I find the majority's legal analysis to be sound under the current state of the law, I write because I nevertheless believe the result to be harsh and not in keeping with protecting homeowners'**

> **rights. Particularly problematic is OCGA § 48-4-47 (a), which requires the homeowner to pay the full redemption price as a condition to maintaining a suit over the validity of the tax sale. This requirement places an onerous burden on persons trying to save their homes. A small tax delinquency can quickly balloon into a substantially greater amount depending on the bid made on the courthouse steps**. In this case, even if appellants had moved more quickly to redeem and had reacted before the redemption fee was compounded over time by interest and penalties, under our present non judicial tax sale scheme, which does not allow for any consideration of hardship or ability to pay, appellants still had almost no chance to redeem their property after the tax sale occurred. **That seems patently unfair, especially given the current economic environment.** I recognize, however, that this is an issue only the legislature may address, and so I reluctantly concur with the judgment.

Appendix A, at 12a.

REASONS FOR GRANTING THIS PETITION

I. GEORGIA'S STATUTES REQUIRING HOMEOWNERS TO PAY MORE THAN $112,000 AS A CONDITION PRECEDENT TO CONTINUING THEIR LAWSUIT CHALLENGING THE VALIDITY OF THE TAX ASSESSMENT, ISSUANCE OF TAX EXECUTION, LEVY AND SALE OF THEIR RESIDENCE FOR ALLEGED NON-PAYMENT OF PROPERTY TAXES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Section 1. One of the privileges and immunities to which the Saffos are entitled as citizens is the right to petition the Government for a redress of grievances." U.S. Constitution, Amendment I.

Despite the safety provided by these fundamental rights, the court below applied O.C.G.A. § 48-4-47 to bar the Saffos from appearing in court and maintaining an action to protect their home. The court below held that because the Saffos did not (indeed, the court acknowledges that they could not) pay the sum of $112,000–the full redemption price for their $2,300 tax debt–they could no longer pursue their challenge to the taking of their home *even though they never received any prior notice of the tax sale.* The Georgia Supreme Court seemed to agree that the Saffos' right

of redemption had not been barred prior to the filing of their suit, but nonetheless it allowed Foxworthy's post-lawsuit service of a purported "second" notice of barment to trigger the Saffos' obligation to pay the extraordinary sum or lose their right to attack the very tax sale giving rise to Foxworthy's demand for over $100,000–a tax sale of which they had no knowledge or notice.

The Georgia Supreme Court held that O.C.G.A. § 48-4-47 does not violate the Saffos' constitutional rights "simply because, in effect, it prevents them and others unwilling or unable to pay or tender the redemption amount from forcing the taxing authority, the new owner, and the trial court to engage in an apparent exercise in futility where, at the end of the day, they will still be in a position where they cannot retain their property." Appendix A at 10a. The appellate court's logic is flawed and troubling.

Most significantly, the decision below is irreconcilable with this Court's decision in *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84-87 (1988). This Court held that Texas could not condition relief from a judgment obtained without personal jurisdiction upon the showing of a meritorious defense to the underlying claim. Georgia's statutory scheme is different from Texas' only in that it is even worse: rather than merely articulate a defense to maintain your day in court, Georgia requires that one whose property has been taken without due process post the entire redemption price as a prerequisite to challenging the unlawful taking. For this reason alone, this Court should grant certiorari to ensure that the Georgia Supreme Court follows and fully complies with the precedent of this Court.

Moreover, even if all steps leading up to and including the tax sale were properly performed (and they were not), if Foxworthy claimed ownership of and the right to evict the Saffos from their Home prior to having properly barred their right of redemption, the Saffos would be entitled to damages for the interference with their right to quiet enjoyment of their Home and, potentially to compensatory and exemplary damages for intentional infliction of emotional distress. The Saffos would be allowed to offset any such damages they would recover on these and other claims against amounts claimed to be owing by Foxworthy for redemption.

The Georgia court's logic also ignores the Saffos' undisputed testimony and evidence coupled with Foxworthy's abject failure to produce any evidence on the issues of whether: (a) the taxes were properly assessed, (b) the tax execution properly issued and transferred to a third party; (c) there was a lawful levy; (d) the notices of the tax sale were properly given; and (e) a valid tax sale was conducted. To suggest that allowing the Saffos to defend on such grounds would be "an exercise in futility" and that "at the end of the day, they will still be in position where they cannot retain their property" seems horribly unfair. This is especially so, because contrary to the appellate court's conclusion and as shown below, Georgia is prohibited from relegating the Saffos to a suit against the sheriff as a substitute for their property rights in and to their Home.

The Georgia Supreme Court's ruling ignores the Saffos' rights to due process of law and the binding precedents of this Court. This Court must, accordingly, grant certiorari and reverse the decision of the court below.

II. THE GEORGIA SUPREME COURT'S CONSTRUCTION OF PROPERTY TAX COLLECTION STATUTES PROVIDING THAT THE SHERIFF "SHALL" PROVIDE CERTAIN NOTICES TO A PROPERTY OWNER LEADING UP TO OR FOLLOWING A TAX SALE AS BEING MERELY "DIRECTORY" INSTEAD OF "MANDATORY" VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

"Due process, in the context of a tax sale, also requires that 'a State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983)." The Saffos learned about the alleged tax sale of their home only after their title had been surreptitiously transferred to Foxworthy and it was demanding more than $50,000 as a condition for the Saffos being able to continue living in their Home. The Saffos simply did not receive the notices that are mandated by law to be sent prior to a tax sale. Due process is not just about laws on the books. As *Mennonite Bd. of Missions* suggests, due process is not an abstraction, but requires notice in fact.

In arriving at its "exercise in futility" conclusion, the Georgia Supreme Court made short shrift of the undisputed testimony from the Saffos' establishing the failure of all of the conditions precedent to a lawful and valid tax sale, holding that "to the extent the Saffos complain of alleged defects in the Sheriff's implementation of the tax sale process, their remedy is a suit against the Sheriff, not a suit against the

property's new owner or its manager." (*Citing*, *inter alia*, *G.E. Capital Mtg. Svcs. v. Clack*, 271 Ga. 82, 83 (1999). Notably, the trial court had also relied on *Harper v. Foxworthy, Inc.*, 254 Ga. App. 495, 498 (2002) for this same proposition.

In a property tax case that turned on the validity of the tax deed, this Court addressed the question of when a sheriff's duties are directory or mandatory and concluded that:

> when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.

French v. Edwards, 80 U.S. 506, 511(1871). *See also, Thatcher v. Powell*, 19 U.S. 119, 127 (1821) ("In summary proceedings where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are coram judice. Without this act of assembly, the order for sale would have been totally void. This act gives the power only on a report to be made by the sheriff. This report gives the court jurisdiction, and without it the court is as powerless as if the act had never passed.")

In *French v. Edwards*, this Court also held that "[p]resumptions are not indulged to sustain irregular proceedings . . . when the irregularity is manifest.

Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective." *Id.* 80 U.S. at 515.

As for whether there were any irregularities in Fulton County tax sales, one need only look at another Georgia appellate court decision (cited by the trial court in its order), in which Foxworthy (Respondent here) was the beneficiary of a decision which noted the following:

> 1. A Vesta Holdings[2] employee testified that it was the company's practice to prepare and send out, on the Fulton County Sheriff's behalf, 20 day notices of intention to levy required to be sent by certified mail pursuant to O.C.G.A. § 48-3-9(a) [*Harper v. Foxworthy, Inc.*, 254 Ga. App. at 497);
>
> 2. Vesta Holdings purported to hire private persons to perform the Fulton County sheriff's duties to personally serve the taxpayer with notice [*id.*];
>
> 3. Vesta Holdings purported to perform, on behalf of the Fulton County sheriff, the duties to publish the notice of the sale in the Fulton County Daily Report pursuant to O.C.G.A. § 48-4-1(a) [*id.*]; and
>
> 4. Vesta Holdings purported to prepare and send out, on the Fulton County Sheriff's behalf, 10 day notices of the impending sale as required by O.C.G.A. § 48-4-1(a) [*id.*].

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[2] Vesta Holdings is a somewhat amorphous amalgamation of private third party individuals and entities which have dominated the privatized collections of taxes in and around metro-Atlanta and Fulton County, Georgia.

Far from being entitled to "presumptions of regularity" Vesta Holdings' purported actions on behalf of the Fulton County Sheriff's office would appear to be a violation of the Sheriff's Nomenclature Act, and specifically O.C.G.A. § 15-16-54. It also raises substantial questions as to whether Vesta or its agents may have committed a crime under O.C.G.A. § 16-10-23 ("A person who falsely holds himself out as a peace officer or other public officer or employee with intent to mislead another into believing that he is actually such officer commits the offense of impersonating an officer and, upon conviction thereof, shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.")

Notably, the facts cited above by the Georgia Court of Appeals were found in a the bench trial that took place in May, 2001. Thus, in 2004, when it was purporting to bar the Saffos' right to redeem, Foxworthy and its attorneys knew full well that tax deeds purportedly signed by the Fulton County Sheriff were not entitled to any presumptions. Indeed, the attempt by Foxworthy to cloak itself with bona fide purchaser status, and to also seek the benefit of the "presumption of regularity" in the performance of the Fulton County Sheriff's duties is (charitably put) unfounded.

Here, as the Georgia Court of Appeals noted in *Harper v. Foxworthy*, the giving of notice was delegated (unlawfully the Saffos contend) to Vesta Holdings, a private third party which was self-interested in not providing effective notice. While these circumstances may not, in and of themselves, be enough to violate due process, by such unlawful delegation, the county had fair warning that statu-

tory notice requirements may well be neglected. This state of affairs also weakens any argument that a post-deprivation remedy is sufficient. In this known conflict situation, the authorities cannot claim that the Saffos' lack of notice was either "unpredictable" or "unauthorized." *Zinermon v. Burch*, 494 U.S. 113, 136-38 (1990).

According to the Georgia Supreme Court, in order to even be heard, the Saffos must first pay not only the tax amount, but the accumulated interest and penalties on the sales price. Of course, calculating the penalties and interest on the sales price is arbitrary and has no correlation with the original amount of taxes owed. Instead, the prohibitive redemption amount appears to be designed only to allow further profit to the private acquirer (transferee) of the tax lien and the private tax sale purchaser and its successors. Allowing this profit to prohibit a meaningful opportunity to be heard violates procedural due process because it effectively extinguishes the opportunity to be heard at the last step of the tax foreclosure process. Significantly, the requirement of tender under these circumstances prohibits a judicial hearing from ever taking place. Indeed, under these circumstances, private parties with a pecuniary interest run the entire process from beginning to end, and the landowner never receives an opportunity to be heard by a neutral public official. Thus, the right to redemption is illusory because the substantial penalty based upon the sales price is punitive and serves no governmental purpose other to enrich a private party.

The Saffos' entire equity in the home will be extinguished simply because they cannot come up with a

redemption price that is over 60 times the original taxes allegedly due[4] before the tax lien was sold.

The Georgia Supreme Court ruled that if the Saffos did not receive notice, the remedy is to sue the sheriff for damages. Citing *Harper v. Foxworthy, Inc., supra*. As shown above, *Harper* does not control. Even if it did, such a post-deprivation remedy is no answer. *Mennonite Bd. of Missions* holds that due process requires pre-deprivation notice when interests in real property are threatened. Whatever Georgia statutory law has to say on this point, as a matter of constitutional due process, a later remedy does not substitute for notice designed to protect against loss in the first place. Only in rare situations, none presented here, does a potential after-the-fact remedy satisfy due process requirements. *Zinermon v. Burch*, 494 U.S. 113 (1990).

Declaring as merely "directory" instead of "mandatory" the duties of a sheriff relating to a tax sale of a citizen's home makes a mockery of the Constitution of the United States and its amendments and of this Court's binding precedents.

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[4] The Saffos do not concede that the taxes were due. Indeed, no taxes could be due if the Tax Commissioner failed to provide any notice of assessment or to perfect the right to file a tax execution and transfer that lien to a third party for collection.

CONCLUSION

The Saffos respectfully submit that the Court should grant this petition for a writ of certiorari, reverse the decision of the Georgia Supreme Court and remand this case for entry of a judgment consistent with the U.S. Constitution and this Court's precedents cited herein.

Respectfully submitted,

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